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Prima Facie Tort Action Upheld Despite Absence of Special Damages and Specific Intent to Harm

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trespass that have resulted in punitive damage awards have generally been accompanied by threats, violence or repeated intrusions on the plaintiff's property.[252] Although this type of conduct was absent in *Le Mistral,* the appellate division held that punitive damages could properly be awarded. While it is uncertain whether the courts will be as willing to approve punitive damage awards in trespass actions generally, it is clear that where attempts by the news media to obtain information infringe on the rights of others, liability and large punitive damage awards may result.

Ronald S. Meckler

Prima facie tort action upheld despite absence of special damages and specific intent to harm

Under the prima facie tort doctrine, a wrong which does not fall within a traditional tort category may nevertheless be actionable if the wrongdoer, without just cause or excuse,[253] has wilfully and intentionally caused injury.[254] As the doctrine has evolved in New

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acted with "actual malice," or that the defendant's conduct evinced a "wanton and willful or reckless disregard of plaintiff's rights." MacKennan v. Jay Bern Realty Co., 30 App. Div. 2d 679, 679, 291 N.Y.S.2d 953, 954 (2d Dep't 1968); *see* Fury Imports, Inc. v. Shakespeare Co., 554 F.2d 1376, 1388-89 (5th Cir. 1977); Walker v. Sheldon, 10 N.Y.2d 401, 179 N.E.2d 497, 223 N.Y.S.2d 488 (1961).

Although not explicitly required by the standard, a showing of violent acts or repeated intrusions has been necessary for the plaintiff to satisfy his burden of proof. *See* note 252 & accompanying text *infra.*

[252] *See* Wort v. Jenkins, 14 Johns. 352 (1817) (per curiam); Smalling v. Jackson, 133 App. Div. 382, 117 N.Y.S. 268 (2d Dep't 1909); Sheldon v. Baumann, 19 App. Div. 61, 45 N.Y.S. 1016 (1st Dep't 1897); DaCosta v. Technico Constr. Corp., 74 Misc. 2d 583, 344 N.Y.S.2d 967 (N.Y.C. Civ. Ct. N.Y. County 1973), *aff'd per curiam,* 78 Misc. 2d 1100, 360 N.Y.S.2d 846 (Sup. Ct. App. T. 1st Dep't 1974); Norton v. Glicksman, 9 Misc. 2d 985, 174 N.Y.S.2d 12 (Sup. Ct. Nassau County 1957); Tifft v. Culver, 3 Hill 180 (Sup. Ct. Utica County 1842); Steenburgh v. McRorie, 60 Misc. 510, 113 N.Y.S. 1118 (Otsego County Ct. 1908).

[253] Any excuse or justification, including profit motive or business justification, is sufficient in New York to negate evidence of actual malice. *See, e.g.,* Squire Records, Inc. v. Vanguard Recording Soc. Inc., 25 App. Div. 2d 190, 268 N.Y.S.2d 251 (1st Dep't 1966) (per curiam), *aff'd mem.,* 19 N.Y.2d 797, 226 N.E.2d 542, 279 N.Y.S.2d 737 (1967); note 255 *infra.* Hecht v. Air Reduction Co., 41 Misc. 2d 463, 245 N.Y.S.2d 935 (Sup. Ct. Queens County 1963).

[254] Knapp Engraving Co. v. Keystone Photo Engraving Corp., 1 App. Div. 2d 170, 172, 148 N.Y.S.2d 635, 637 (1st Dep't 1956); Brandt v. Winchell, 283 App. Div. 338. 342, 127 N.Y.S.2d 865, 868 (1st Dep't 1954), *aff'd,* 3 N.Y.2d 628, 148 N.E.2d 160, 170 N.Y.S.2d 828 (1958). Traditional tort law has been criticized by one noted commentator as "a set of pigeonholes, each bearing a name, into which the act or omission of the defendant must be fitted before the law will take cognizance of it and afford a remedy." W. PROSSER, LAW OF TORTS § 1 (4th ed. 1971). In response to this inherent rigidity, the courts developed the prima facie tort doctrine as a means of providing redress in instances where harm is intentionally and

York, a plaintiff seeking to establish a prima facie tort claim is required to allege and prove specific intent to harm[255] and special

maliciously inflicted through conduct that would otherwise be lawful. *See* Advance Music Corp. v. American Tobacco Co., 296 N.Y. 79, 70 N.E.2d 401 (1946); Ruza v. Ruza, 286 App. Div. 767, 769, 146 N.Y.S.2d 808, 811 (1st Dep't 1955). *See also* Halpern, *Intentional Torts and the Restatement*, 7 BUFFALO L. REV. 7, 13 (1957); Note, *The Prima Facie Tort Doctrine*, 52 COLUM. L. REV. 503, 505 (1952) [hereinafter cited as *Prima Facie Tort Doctrine*]; Note, *The Prima Facie Tort Doctrine in New York—Another Writ?*, 42 ST. JOHN'S L. REV. 530, 532-33 (1968) [hereinafter cited as *Another Writ?*].

Originally derived from actions on the case, *see* Knapp Engraving Co. v. Keystone Photo Engraving Corp., 1 App. Div. 2d 170, 172, 148 N.Y.S.2d 635, 637 (1st Dep't 1956), the prima facie tort concept was first articulated in England in Mogul S.S. Co. v. McGregor, Gow, & Co., 23 Q.B.D. 598 (1889), *aff'd*, [1892] A.C. 25, wherein Lord Bowen stated: "[I]ntentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse." 23 Q.B.D. at 613. The concept was subsequently adopted in the United States in Aikens v. Wisconsin, 195 U.S. 194, 204 (1904) (citing Mogul S.S. Co. v. McGregor, Gow, & Co., 23 Q.B.D. 598, 613 (1889), *aff'd*, [1892] A.C. 25).

While the precise history of the prima facie tort in New York is difficult to trace, the courts appear to have used the broad principles of the doctrine for the first time in Beardsley v. Kilmer, 236 N.Y. 80, 140 N.E. 203 (1923), wherein the Court of Appeals stated: [T]he courts in response to a broader and more equitable vision of the interrelated rights of individuals have tended toward the denial of this proposition that it is lawful to perform an otherwise legal act injuring another when there is no excuse for its performance except the malicious purpose of injury. *Id.* at 89, 140 N.E. at 205 (citations omitted). After *Beardsley*, the doctrine was applied with increasing frequency. *See, e.g.*, American Guild of Musical Artists, Inc. v. Petrillo, 286 N.Y. 226, 36 N.E.2d 123 (1941); Opera on Tour, Inc. v. Weber, 285 N.Y. 348, 34 N.E.2d 349 (1941); Al Raschid v. News Syndicate Co., 265 N.Y. 1, 191 N.E. 713 (1934). Finally, in Advance Music Corp. v. American Tobacco Co., 296 N.Y. 79, 70 N.E.2d 401 (1946), the Court of Appeals stated that the prima facie tort is one of the "general principle[s] of liability in tort" and therefore is not limited in application to any particular class of cases. *Id.* at 84, 70 N.E.2d at 403. For an in-depth account of the doctrine's development in the common law, see Forkosch, *An Analysis of the "Prima Facie Tort" Cause of Action*, 42 CORNELL L.Q. 465 (1957); Halpern, *supra*, at 7.

[255] In Beardsley v. Kilmer, 236 N.Y. 80, 140 N.E. 203 (1923), the Court of Appeals stated that an otherwise lawful act is actionable only if the defendant is shown to have been motivated entirely by "disinterested malevolence . . . unmixed with any other [motive] and exclusively directed to injury and damage of another." *Id.* at 90, 140 N.E. at 206 (citation omitted). Thus, in New York, proof that the defendant intended to do the injury-producing act, usually sufficient to establish an intentional tort claim, is insufficient to establish a prima facie tort. Ruza v. Ruza, 286 App. Div. 767, 769, 146 N.Y.S.2d 808, 811 (1st Dep't 1955). This strict view of the intent requirement was upheld in Reinforce, Inc. v. Birney, 308 N.Y. 164, 124 N.E.2d 104 (1954), wherein the Court of Appeals dismissed the complaint of a contracter who alleged that the defendant-union's refusal to supply workers forced him out of business. The *Reinforce* Court, in support of its holding, observed that the plaintiff had failed to show "that malice was the *only* spur to the union's *sole* activity or that damage to plaintiffs was the union's purpose." *Id.* at 167, 124 N.E.2d at 105 (emphasis added); *see* Benton v. Kennedy-Van Saun Mfg. & Eng'r Corp., 2 App. Div. 2d 27, 152 N.Y.S.2d 955 (1st Dep't 1956); Girard Trust Co. v. Melville Shoe Corp., 275 App. Div. 117, 88 N.Y.S.2d 121 (1st Dep't), *aff'd mem.*, 300 N.Y. 496, 88 N.E.2d 724 (1949). Some commentators have argued that the strict intent requirement relegates the prima facie tort doctrine to an impotent role. *See, e.g.*, Forkosch, *supra* note 254, at 479; *Another Writ?*, *supra* note 254, at 535.

damages.[256] Recently, however, in *Drago v. Buonagurio*,[257] the Appellate Division, Third Department, upheld a prima facie tort action against an attorney for the initiation and prosecution of a frivolous malpractice claim although the plaintiff's complaint failed to allege special damages and specific intent.[258]

The plaintiff in *Drago* was a physician who had been charged in an earlier suit with professional malpractice purportedly leading to the death of Francis Buonagurio.[259] The malpractice action had been instituted at the direction of Jerome Brownstein, an attorney retained by the estate of the deceased.[260] Alleging that Brownstein had no basis to believe that he had treated the deceased, the physician sued both the administratrix of the Buonagurio estate and Brownstein for bringing a malpractice suit with malicious disregard for the truth of the underlying claims.[261] In his complaint, the plaintiff requested $200,000 in general damages.[262] Upon Brownstein's motion, the Supreme Court, Schenectady County, dismissed the complaint for failure to state a cause of action.[263]

On appeal, the Appellate Division, Third Department, re-

[256] A.T.I., Inc. v. Ruder & Finn, 42 N.Y.2d 454, 368 N.E.2d 1230, 398 N.Y.S. 2d 864 (1977); John C. Supermarket, Inc. v. New York Property Ins. Underwriting Ass'n., 60 App. Div. 2d 807, 400 N.Y.S.2d 824 (1st Dep't 1978); Brandt v. Winchell, 283 App. Div. 338, 127 N.Y.S.2d 865 (1st Dep't 1954), *aff'd*, 3 N.Y.2d 628, 148 N.E.2d 160, 170 N.Y.S.2d 828 (1958). The pecuniary loss requirement arises in part because the prima facie tort theory evolved from the common-law form of action on the case, which required proof of special damages. *See* W. PROSSER, LAW OF TORTS § 7 (4th ed. 1971).

In addition, to satisfy the requirement of actual pecuniary loss, the plaintiff's complaint "must state specifically and with particularity the items of loss claimed by the plaintiff, giving the names of the employers, customers or others who are claimed to have taken away their business from plaintiff." Faulk v. Aware, Inc., 3 Misc. 2d 833, 839, 155 N.Y.S.2d 726, 732 (Sup. Ct. N.Y. County 1956) (citations omitted), *aff'd mem.*, 3 App. Div. 2d 703, 160 N.Y.S.2d 621 (1st Dep't 1957). Thus, a plaintiff who could allege only damage to his reputation would fail to state a cause of action in New York. *See* Friedlander v. National Broadcasting Co., 39 Misc. 2d 612, 241 N.Y.S.2d 477 (Sup. Ct. N.Y. County 1963), *rev'd per curiam on other grounds*, 20 App. Div. 2d 701, 246 N.Y.S.2d 889 (1st Dep't 1964); J.J. Theatres, Inc. v. V.R.O.K. Co., 96 N.Y.S.2d 271 (Sup. Ct. N.Y. County 1950).

[257] 61 App. Div. 2d 282, 402 N.Y.S.2d 250 (3d Dep't 1978), *rev'g* 89 Misc. 2d 171, 391 N.Y.S.2d 61 (Sup. Ct. Schenectady County 1977).

[258] 61 App. Div. 2d at 286-87, 402 N.Y.S.2d at 253.

[259] *Id.* at 284, 402 N.Y.S.2d at 251.

[260] *Id.*

[261] *Id.* The plaintiff in *Drago* alleged that the defendant attorney: (1) failed to fully investigate the facts before bringing the malpractice suit; (2) conducted himself in a "malicious, unethical and grossly negligent" manner; and (3) attempted to employ the malpractice action "as a discovery device in order to ascertain where responsibility could be placed." *Id.*

[262] 89 Misc. 2d at 171, 391 N.Y.S.2d at 62. The plaintiff requested damages for mental anguish and defamation of character.

[263] 89 Misc. 2d at 173, 391 N.Y.S.2d at 63.

versed, holding that the plaintiff's cause of action was maintainable as a prima facie tort claim.[264] Justice Sweeney, writing for a unanimous court,[265] agreed with the conclusion of the trial court that the plaintiff's allegations failed to state a cause of action under traditional theories of tort,[266] but stated that "the law should never suffer an injury and a damage without a remedy."[267] In support of its conclusion, the court traced the historical development of prima facie tort theory and observed that the doctrine played an important role in preserving a degree of flexibility in the law of torts.[268] Noting that "[t]he instant case has its genesis in the drastic increase in . . . medical malpractice actions . . . , many of which are considered baseless,"[269] the court reasoned that the plaintiff should not be denied relief merely because the facts in the case were unique and the cause of action novel.[270] Without considering the requirements of special damages and specific intent, the court upheld plaintiff's cause of action, finding that the allegations set forth "a clear intentional wrong, causing apparent and foreseeable harm to plaintiff, without excuse or justification."[271] The court stated, however, that its holding should not be interpreted as creating a cause of action

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[264] 61 App. Div. 2d at 286, 402 N.Y.S.2d at 253.

[265] The panel consisted of Presiding Justice Mahoney and Justices Greenblott, Sweeney, Kane and Herlihy.

[266] The *Drago* court concluded that the plaintiff's complaint failed to state a cause of action for abuse of process because it lacked an allegation that process was used improperly subsequent to its issuance. *See* Williams v. Williams, 23 N.Y.2d 592, 246 N.E.2d 333, 298 N.Y.S.2d 473 (1969). Similarly, the complaint was insufficient to state a cause of action for malicious prosecution, since the defendant had not interfered with the physician's person or property and the malpractice claim had not been finally adjudicated in favor of the physician. *See id.* at 596, 246 N.E.2d at 336, 298 N.Y.S.2d at 476. Finally, the *Drago* plaintiff could not maintain a negligence claim as the attorney owed him no legal duty. 61 App. Div. 2d at 285, 402 N.Y.S.2d at 251-52; *see* Joffe v. Rubenstein, 24 App. Div. 2d 752, 263 N.Y.S.2d 867 (1st Dep't 1965) (per curiam).

[267] 61 App. Div. 2d at 285, 402 N.Y.S.2d at 252 (citing Kujek v. Goldman, 150 N.Y. 176, 44 N.E. 773 (1896); Halio v. Lurie, 15 App. Div. 2d 62, 222 N.Y.S.2d 759 (2d Dep't 1961)).

[268] 61 App. Div. 2d at 286, 402 N.Y.S.2d at 252. A noted commentator has stated that

> [t]he law of torts is anything but static, and the limits of its development are never set. When it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not of itself operate as a bar to the remedy.

W. PROSSER, LAW OF TORTS § 1 (4th ed. 1971) (citing Kujek v. Goldman, 150 N.Y. 176, 44 N.E. 773 (1896)).

[269] 61 App. Div. 2d at 286, 402 N.Y.S.2d at 252. *See generally* Note, *Rx for New York's Medical Malpractice Crisis*, 11 COLUM. J.L. & SOC. PROBS. 467 (1975). The court seemed particularly disturbed by the attorney's egregious conduct which it described as "not only intentional and wrongful, but under the unusual circumstances alleged, irresponsible and without justification." 61 App. Div. 2d at 286, 402 N.Y.S.2d at 252.

[270] 61 App. Div. 2d at 286, 402 N.Y.S.2d at 252.

[271] *Id.*

"whenever a physician escapes malpractice liability and claims he was wrongfully charged in the first place."[272]

Despite the court's disclaimer, it is submitted that the *Drago* decision represents an unwarranted departure from well-established precedent. While the third department's concern with the lack of an existing tort remedy to redress injuries resulting from frivolous malpractice suits is understandable,[273] its use of the prima facie tort theory does not appear to be a suitable solution to the problem. Although the doctrine was developed to preserve some flexibility in the law of torts,[274] it was not intended to be a catch-all remedy for civil grievances not rising to the level of a traditional tort.[275] The court's application of the doctrine to the facts in *Drago* seems inconsistent with the narrow approach to the prima facie tort theory traditionally taken by the New York courts.[276] Since the doctrine makes a defendant liable for conduct that is not actionable absent

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[272] *Id.* at 286-87, 402 N.Y.S.2d at 253.

[273] Physician suits against lawyers for the groundless institution of medical malpractice actions have taken a number of unsuccessful forms. Actions for malicious prosecution, abuse of process, defamation, intentional infliction of mental distress and prima facie tort have met with minimal success. *See* Birnbaum, *Physicians Counterattack: Liability of Lawyers for Instituting Unjustified Medical Malpractice Actions,* 45 FORDHAM L. REV. 1003 (1977); Note, *Physician Countersuits: Malicious Prosecution, Defamation and Abuse of Process as Remedies For Meritless Medical Malpractice Suits,* 45 U. CINN. L. REV. 604 (1976); note 266 *supra.*

[274] *See, e.g.,* Belsky v. Lowenthal, 62 App. Div. 2d 319, 405 N.Y.S.2d 62 (1st Dep't 1978); Susskind v. Ipco Hosp. Supply Corp., 49 App. Div. 2d 915, 373 N.Y.S.2d 627 (2d Dep't 1975); Ruza v. Ruza, 286 App. Div. 767, 146 N.Y.S.2d 808 (1st Dep't 1955); Sheppard v. Coopers' Inc., 13 Misc. 2d 862, 156 N.Y.S.2d 391 (Sup. Ct. N.Y. County), *aff'd mem.,* 2 App. Div. 2d 881, 157 N.Y.S.2d 898 (1st Dep't 1956); Brown, *The Rise and Threatened Demise of the Prima Facie Tort Principle,* 54 Nw. U.L. REV. 563, 573 (1959); note 254 *supra.* The New York Court of Appeals recently permitted plaintiff to plead alternatively both traditional and prima facie tort theories of recovery. Board of Educ. v. Farmingdale Classroom Teacher's Ass'n., Local 1889, 38 N.Y.2d 397, 406, 343 N.E.2d 278, 284-85, 380 N.Y.S.2d 635, 645 (1975); *cf.* Ruza v. Ruza, 286 App. Div. 767, 146 N.Y.S.2d 808 (1st Dep't 1955) (alternative pleading not permitted). The *Farmingdale* decision does not, however, suggest that a defective traditional tort claim may be converted into a prima facie tort cause of action. In fact, the court noted that the remedies are mutually exclusive. 38 N.Y.2d at 406, 343 N.E.2d at 284, 380 N.Y.S.2d at 645.

[275] *See generally* Brown, *supra* note 274; note 277 *infra.*

[276] *See* note 256 *supra.* In Test v. Eldot, N.Y.L.J., Feb. 29, 1956, at 7, col. 4 (Sup. Ct. N.Y. County), Justice Saypol articulated the rationale most commonly cited as a basis for retaining the special damages requirement:

> To permit a recovery in prima facie tort upon an allegation and proof of general damage would throw open to regulation of morals and ethics all conduct which, when substandard, results in injured feelings without other and special damage. It is allegation of temporal damage which makes such an action maintainable upon a proper statement of a cause in prima facie tort.

Id.; *see, e.g.,* A.T.I., Inc. v. Ruder & Finn, 42 N.Y.2d 454, 368 N.E.2d 1230, 398 N.Y.S.2d 864 (1977); Advance Music Corp. v. American Tobacco Co., 296 N.Y. 79, 70 N.E.2d 401 (1946); Lincoln First Bank v. Siegel, 60 App. Div. 2d 270, 400 N.Y.S.2d 627 (4th Dep't 1977); Coopers & Lybrand v. Levitt, 52 App. Div. 2d 493, 384 N.Y.S.2d 804 (1st Dep't 1976).

special damages and specific intent to injure, the courts have been careful to avoid applications that would weaken the doctrine's strict pleading requirements.[277] By permitting the plaintiff to maintain his suit without alleging special damages or specific intent, the *Drago* court extended the remedy well beyond its deliberately circumscribed limits. It is suggested that reliance on the third department's *sub silentio* rejection of these well-settled requirements for prima facie tort actions may meet with differing results when the factual circumstances are less compelling or the argument is advanced before a different tribunal.[278]

Dennis Glazer

Court of Appeals signals stricter enforcement of Sandoval *guidelines*

It is well settled in New York that a defendant who testifies in his own behalf may be cross-examined concerning prior criminal, vicious or immoral acts which tend to impugn his credibility.[279] Such

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[277] In Ruza v. Ruza, 286 App. Div. 767, 146 N.Y.S.2d 808 (1st Dep't 1955), the court stated the oft-quoted rule regarding the prima facie tort doctrine and its function:

> The key to the prima facie tort is the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or a series of acts which would otherwise be lawful. The need for the doctrine of prima facie tort arises only because the specific acts relied upon—and which it is asserted caused the injury—are not, in the absence of the intention to harm, tortious, unlawful, and therefore, actionable.

Id. at 769, 146 N.Y.S.2d at 811; *see* note 256 *supra.*

[278] In a recent decision, Belsky v. Lowenthal, 62 App. Div. 2d 319, 405 N.Y.S.2d 62 (1st Dep't 1978), the Appellate Division, First Department, reversed a trial court's finding that a defective complaint for malicious prosecution of a medical malpractice suit could be sustained as a prima facie tort claim.

[279] *See, e.g.*, People v. Sandoval, 34 N.Y.2d 371, 376, 314 N.E.2d 413, 417, 357 N.Y.S.2d 849, 854 (1974); People v. Kass, 25 N.Y.2d 123, 125, 250 N.E.2d 219, 221, 302 N.Y.S.2d 807, 809 (1969); People v. Webster, 139 N.Y. 73, 84, 34 N.E. 730, 733 (1893); E. FISCH, NEW YORK EVIDENCE § 702 (2d ed. 1977) [hereinafter cited as FISCH]; 3 L. FRUMER & E. BISKIND, BENDER'S NEW YORK EVIDENCE § 141 (1975) [hereinafter cited as FRUMER & BISKIND]; W. RICHARDSON, EVIDENCE § 498 (10th ed. J. Prince 1973) [hereinafter cited as RICHARDSON]; 3A J. WIGMORE, EVIDENCE § 890 (rev. ed. 1970). At early common law, individuals convicted of an "infamous crime" were believed to be predisposed to commit perjury and thus were prohibited from testifying before any court. FISCH, *supra*, §§ 262, 263; C. MCCORMICK, LAW OF EVIDENCE § 43 (2d ed. 1972); 2 J. WIGMORE, EVIDENCE § 519 (3d ed. 1940); Note, *The Dilemma of the Defendant Witness in New York: The Impeachment Problem Half-Solved*, 50 ST. JOHN'S L. REV. 129, 134 (1975). In 1879, the New York Legilsature abolished this prohibition but retained its underlying philosophy by enacting a statute that permitted introduction of past convictions as a means of impeaching a witness. Ch. 542, § 832,[1879] N.Y. Laws 609 (current version at CPLR 4513 (McKinney 1963)). Today, the New York approach is followed in a majority of jurisdictions. 3A J. WIGMORE, EVIDENCE § 890 (rev. ed. 1970).